

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
United States Department of Justice, Federal)	RM -10865
Bureau of Investigation and Drug Enforcement)	
Administration)	
)	
Joint Petition for Rulemaking to Resolve Various)	
Outstanding Issues Concerning the Implementation)	
Of the Communications Assistance for Law)	
Enforcement Act)	
_____)	

**REPLY COMMENTS
OF THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (“USTA”),¹ submits its reply comments through the undersigned and pursuant to the Federal Communications Commission’s (“FCC’s or Commission’s”) Public Notice² seeking comment on the Joint Petition for Expedited Rulemaking (“Petition”) of the Federal Bureau of Investigation, U.S. Department of Justice, and U.S. Drug Enforcement Administration (collectively, “Law Enforcement”).

DISCUSSION

USTA files these reply comments on the future application of CALEA based on the critical role that local exchange carriers play in providing Law Enforcement with the ability to intercept court authorized electronic surveillance. USTA member companies are committed to working with Law Enforcement to investigate crime and terrorism. However, what Law

¹ USTA is the Nation’s oldest trade organization for the local exchange carrier industry. USTA’s carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² See Public Notice, Comment Sought on CALEA Petition for Rulemaking, RM-10865, DA No. 04-700 (Mar. 12, 2004) (Public Notice).

Enforcement seeks must be consistent with the Communications Assistance for Law Enforcement Act (“CALEA”)³ and its legislative history.

In USTA’s initial comments, we concluded, along with a majority of commenters, that Law Enforcement’s proposals are counter to CALEA and the intent of Congress. Congress in enacting CALEA carefully balanced the right to privacy, technological progress, and the costs to carriers and consumers, against the needs of Law Enforcement. Similarly, CALEA requires the FCC to balance these interests and then determine whether Law Enforcement’s request is lawful under the statute. This cannot be done via a declaratory ruling, but requires a rulemaking. The complexity of the issues presented, coupled with the requirement that the FCC balance the competing interests of United States citizens, telecommunications carriers, and Law Enforcement can only be accomplished via a rulemaking proceeding.

The Existing CALEA Standards Process Strikes a Careful Balance Among Competing Interests

We agree with the Telecommunications Industry Association (“TIA”) that “law enforcement has long been determined to guide, if not dictate, the detailed CALEA solutions that industry may implement.”⁴ But this does not mean that law enforcement can circumvent the standards process for implementing proposed solutions. CALEA was enacted in 1994 to ensure that the technological changes occurring in the circuit switched telecommunications network would not compromise the ability of law enforcement to engage in lawful electronic surveillance. Congress when enacting CALEA balanced “three key policies”:

- (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly

³ Communications Assistance for Law Enforcement Act (CALEA), Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended 47 U.S.C. and 47 U.S.C.).

⁴ *Id.*

powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.⁵

In order to ensure that these “three key policies” are balanced, CALEA contemplates that the telecommunications industry will develop technical requirements and standards that implement the section 103 assistance capability requirements, in consultation with law enforcement.

Under section 107(a), Congress delineated the roles and responsibilities of industry and law enforcement in developing a technical standard. The section provides in relevant part that “the Attorney General,⁶ in coordination with other Federal, State, and local law enforcement agencies, shall consult with the appropriate associations and standard setting organizations of the telecommunications industry . . .”⁷ to ensure the efficient and industry - wide implementation of the capability requirements of section 103. The CALEA House Report clarifies this delineation of roles by adding that the requirements are law enforcement’s, but “the telecommunications industry itself shall decide how to implement the requirements.”⁸ Therefore, it is industry’s role to decide how law enforcement’s requirements are to be implemented. This rationale is further supported by a statement of Senator Leahy, co-sponsor of CALEA: “The bill protects law enforcement wiretap capabilities, but defers to industry on meeting those needs.”⁹

Concurrent with efforts to provide for a cooperative standards process, Congress attempted to guard against industry abuse of its assigned role by caveating its delegation with a good faith condition. As noted in the CALEA House Report, telecommunications carriers “will have a ‘safe harbor’ and be considered in compliance with the capability requirements if they

⁵ See Comments of the Telecommunications Industry Association at 3 (TIA) (citing H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3493 (1994) (House Report)).

⁶ See 28 C.F.R. § 0.85(o). “The Director of the Federal Bureau of Investigation shall . . . carry out the responsibilities conferred upon the Attorney General under the Communications Assistance for Law Enforcement Act, Title I of Public L. 103-414 (108 Stat. 4279), subject to the general supervision and direction of the Attorney General.”

⁷ 47 U.S.C § 1006(a)(1).

⁸ House Report at 19.

⁹ See S. Hrg 103-1022, at 111 (statement of Senator Leahy).

comply with publicly available technical requirements or standards designed in good faith.”¹⁰

Law enforcement interests are further protected by the deficiency and enforcement provisions of section 107(b)¹¹ and 108(a)(2),¹² respectively.

Section 103(b)(1) of CALEA places limitations upon law enforcement in designing “features and systems configurations.” Law Enforcement cannot “require any specific design of equipment, facilities, services, features, or system configurations to be adopted by any provider . . .”¹³ “Congress also expressly declared that law enforcement may not ‘prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service.’”¹⁴ “Law enforcement’s role in the standards development process is limited to ‘consultation’ with appropriate standards setting organizations.”¹⁵

At the same time, Congress recognized that the standards developed by industry might be inadequate to carry out the statutory mandates. Section 107(b) of CALEA authorizes the FCC to issue rules establishing additional technical requirements and standards if a government agency believes that an industry standard is deficient, the Commission may establish, upon petition, technical requirements or standards that meet the capability requirements of section 103. The FCC cannot make an industry standard determination absent a deficiency petition being properly presented before it. In fulfilling its obligations under section 107(b), the FCC must ensure that technical requirements or standards established under its authority meet the assistance requirements of section 103 by cost-effective methods, while minimizing potentially adverse

¹⁰ House Report at 26.

¹¹ 47 U.S.C. § 1006(b). “[I]f a government agency . . . believes that such requirements or standards are deficient, the agency . . . may petition the Commission to establish . . . technical requirements or standards . . .”

¹² *See Id.* (stating that “A court shall issue an order enforcing this title . . . if the court finds that . . . compliance with the requirements of this title . . . would have been reasonably achievable if timely action had been taken.”)

¹³ 47 U.S.C. § 1002(b)(1).

¹⁴ TIA at 7 (citing 47 U.S.C. § 1002(b)(1)).

¹⁵ TIA at 8.

effects on residential rates, the introduction of new technologies and services,¹⁶ and consumer privacy.¹⁷ The Commission must also specify a reasonable time period and conditions for compliance during periods of transition to the new standard.

Law Enforcement Should Not Be Permitted To Circumvent the Standards Process

For nearly a decade, a large body of work has been done to develop standards and products to enable carriers to satisfy their CALEA requirements.¹⁸ TIA has worked diligently “to adopt and improve CALEA standards, and to ensure that law enforcement has access to appropriate LAES (lawfully authorized electronic surveillance) capabilities consistent with CALEA’s statutory requirements.”¹⁹ Significant activity has occurred in regards to packet mode communications and TIA has proposed J-STD-025(B). This version of J-STD-025 “provides enhancements to further support electronic surveillance of packet-data telecommunications services.”²⁰ In fact, Law Enforcement has been involved and provided significant input to the proposed standard, but has abstained from voting the proposed J-STD-025(B). Balloting of the proposed J-STD-025(B) will likely conclude in May 2004, with its approval.

As BellSouth Corporation (“BellSouth”) and TIA point out, Law Enforcement’s Petition is critical of the CALEA standards process for packet-mode communications and “claims in a sentence that all current packet-mode standards are deficient, and then offers a substitute regulatory scheme.”²¹ We agree with TIA that what law enforcement seeks is for the

¹⁶ See 47 U.S.C. § 157(a). “It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under shall have the burden of to demonstrate that such proposal is inconsistent with the public interest by petition or application to the Commission.”

¹⁷ 18 U.S.C. § 2518(5). “[A]uthorizing to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception”

¹⁸ BellSouth Corporation Comments at 23 (BellSouth).

¹⁹ TIA at 9.

²⁰ BellSouth at 24.

²¹ See TIA at 9 (paraphrasing the Law Enforcement’s Petition at 34-37).

“Commission to ignore the standards that exist today, created at the expense of thousands of hours of industry subject matter experts’ time and months of meetings, and adopt a separate set of capabilities and coverage requirements developed by law enforcement.” This is not the process that Congress envisioned nor what the statute permits.

Section 107 of CALEA requires that Law Enforcement correct any alleged deficiencies to J-STD-025(B) through the industry standards body or file a deficiency petition with the FCC.

Law Enforcement’s Petition has not provided any “alleged deficiencies or the additional capabilities that should be in the standards.”²² “Indeed, with the exception of broadband access service, broadband telephony service, and push-to-talk wireless service, the Petition does not even identify what types of packet-mode services it wants to cover, leaving the implication that all packet-mode services are covered”²³ Under the law, Law Enforcement “may not ask the Commission to override the industry standards process and impose a new system via rulemaking.”²⁴

Clearly, we are left with the perception that Law Enforcement is attempting to sidestep the standards process and Section 107 and have the FCC declare that all packet mode services are covered under CALEA. This is not permitted, as it would violate the intent of Congress and the statutory requirements of CALEA. Moreover, there is no reason to believe, based on the Petition that the standards body is not working, and only through the standards body can Congress’s “three key policies” be balanced.

Finally, we agree with BellSouth that the FCC should seek comment in its upcoming rulemaking on “the standard-setting process and any areas where Commission guidance would be helpful.”²⁵

²² *Id.*

²³ *Id.*

²⁴ TIA at 10.

CALEA Must Apply to All Service Providers

USTA member companies will not always have the ability to provide Law Enforcement with the information that it needs, so CALEA must apply evenly to the service providers it was specifically designed to cover, regardless of whether broadband access or telephony will be required under the statute. We agree with SBC Communications, Inc. position, which is supported by the legislative history²⁶ that a provider's obligations under CALEA must reflect what is under the provider's control. "The question of which communications are in a carrier's control will depend on the design of the service or feature at issue, which this legislation does not purport to dictate."²⁷ The division of responsibility is consistent with the intent of Congress that "carriers are required to provide data carried in a digital form to law enforcement in that form, while it is law enforcement's responsibility to determine if the communication is 'voice, fax, or data and [to] translat[e] it into usable form.'"²⁸ For example, Verizon points out that it "does not have the ability to interpret information above layer 2 where it provides wholesale broadband access service; in such situations, law enforcement would have to determine who the wholesale customer is, and go to that customer to interpret information above layer 2."²⁹ Thus, "law enforcement may also have to go to the application service provider to obtain useable information, and any CALEA requirements must be tailored to reflect these constraints."³⁰

CONCLUSION

Law Enforcement's Petition asks the Commission to undertake a dramatic expansion of its CALEA regime. As the initial comments filed by numerous parties and these reply comments demonstrate, the proposals made by Law Enforcement involve highly complex questions which must be addressed through the development of a full factual record in a rulemaking proceeding

²⁵ BellSouth at 26.

²⁶ SBC Communications, Inc. Comments at 8 (SBC).

²⁷ *See Id.* (citing House Report at 3502).

²⁸ *See Id.* (citing House Report at 3402).

²⁹ Verizon Comments at 8.

before adoption by this Commission. Failure to conduct such a proceeding would be inconsistent with the mandate of the Administrative Procedure Act.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION



By: _____

James W. Olson
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, D.C. 20005-2164
(202) 326-7300

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³⁰ SBC at 9.

CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on April 27, 2004, the aforementioned Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the following parties.

John G. Malcolm
Deputy Assistant Attorney General,
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 2113
Washington, D.C. 20530

Patrick W. Kelley
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Room 7427
Washington, DC 20535

Robert T. Richardson
Deputy Chief Counsel
Office of Chief Counsel
Drug Enforcement Administration
Washington, D.C. 20537

/s/ Meena Joshi
Meena Joshi